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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASKARI ABDULLAH MUHAMMAD,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether the Florida death-sentencing statute as applied to Petitioner as a matter of law restricted consideration of mitigating circumstances in violation of the Eighth and Fourteenth Amendments.

2. Whether Petitioner's death sentence violates the Eighth and Fourteenth Amendments when it is based upon factors not included in the list of statutory aggravating circumstances and upon statutory circumstances which are as a matter of law inapplicable or factually insufficient.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASKARI ABDULLAH MUHAMMAD,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner, ASKARI ABDULLAH MUHAMMAD, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in this case.

OPINION BELOW

The opinion of the Supreme Court of Florida affirming the summary denial of a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850 is reported as Muhammad v. State, 426 So.2d 533 (Fla. 1983). The opinion is attached hereto as Appendix A.

JURISDICTION

Petitioner was found guilty of first degree murder in Dade County, Florida, on April 21, 1975, and was sentenced to death. Direct appeal was taken to the Supreme Court of Florida which affirmed the conviction and sentence. Knight v. State, 338 So.2d 201 (Fla. 1976).* A petition for writ of habeas corpus was filed in the Supreme Court of Florida challenging the ef-

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* Petitioner formerly was known as Thomas Knight. His name has been changed pursuant to the laws of Florida.

fectiveness of appellate counsel. The writ was denied. Knight v. State, 394 So.2d 997 (Fla. 1981). A motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850 was filed, denied summarily, and the denial affirmed on direct appeal to the Supreme Court of Florida. Muhammad v. State, 426 So.2d 533 (Fla. 1983).

Motion for rehearing was denied March 2, 1983.

An Application for Extension of Time Within Which to File a Petition for Writ of Certiorari was granted on April 23, 1983, extending the time to and including May 31, 1983. The Order is attached as Appendix D.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves the following provisions of the statutes of the State of Florida, which are set forth in Appendix E: §§775.082, 782.04, 921.141.

STATEMENT OF THE CASE/ HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner was charged in Dade County, Florida, with the murder of Sidney and Lillian Gans.

On the morning of July 17, 1974, Sidney Gans was abducted at gunpoint from the parking lot of his company and told to drive to his home and get his wife. Their abductor in the back seat, Mrs. Gans at the wheel, they all rode to Mr. Gans' bank. Mr. Gans went inside the bank to withdraw $50,000. While there, he notified law enforcement agencies of his predicament. He told bank authorities that he did not know who his abductor was. He could give no description other than that the abductor was Black. Mr. Gans then left the bank with the money and got back into his car which his wife had been driving in the downtown Miami area, the abductor still in the back seat. The couple then drove to South Miami while law enforcement agencies kept the vehicle under continuous surveillance. They entered a secluded construction area on the outskirts of South Miami where, during a two to five minute break in police surveillance caused by the rugged terrain, the couple was shot to death. Police coming upon the scene minutes later saw a Black male running toward an overgrown area several hundred yards from the Gans' vehicle. After a four-hour search of the area, Petitioner was apprehended in the thicket.

The defenses at trial were Not Guilty and Not Guilty by Reason of Insanity.

After the State presented its evidence on the issue of guilt, the defense offered experts on the issue of sanity. Evidence was introduced that Petitioner had three years before been involuntarily committed to Northeast Florida State Hospital as incompetent and that his diagnosis there was

paranoid schizophrenia. There was testimony that Petitioner suffers a chronic mental illness which is characterized by periods of paranoid schizophrenic rage and periods of remission and that he did not know right from wrong on July 17, 1974.

The testimony of one defense witness, Lt. Pat DuVal, was excluded. The defense proffered that Lt. DuVal, a sheriff's deputy from Petitioner's home town, had known Petitioner since Petitioner was about ten years old and that he would testify about Petitioner's childhood, including abuse and neglect of Petitioner and his sisters by their father, particularly their father's arrest and conviction for incest when Petitioner was a small boy. The State objected to the testimony about Petitioner's father as irrelevant and as hearsay. The defense, citing the conflicting conclusions reached by a defense witness and a State witness on the issue of sanity, countered that the testimony would tend to substantiate the conclusion reached by the defense witness and would therefore aid the jury in reaching its decision. The State's objection was sustained as to all of Lt. DuVal's testimony.

The State's rebuttal witnesses variously concluded that although Petitioner suffered from mental illness, characterized particularly by paranoia, he knew right from wrong on July 17, 1974. There was also testimony from lay witnesses that Petitioner did not exhibit bizarre or unusual behavior in their presence prior to the incident.

Petitioner was found guilty of first degree murder on April 19, 1975.

At the penalty phase, no new evidence was offered by either side. The defense did not attempt to reintroduce the excluded testimony of Lt. DuVal. Defense counsel did put into

evidence some previously discussed psychiatric reports.

The trial court instructed the jury that "[t]he mitigating circumstances which you may consider, if established by the evidence, are as follows," followed by a reading of the list of mitigating circumstances contained in §921.141(5), Florida Statutes. (TT 3617-3618).*

The court's belief that mitigating circumstances were to be limited to those set forth in the statute is also reflected in his conference with counsel, during which he observed, "[I]t is the duty of the defense. . . to show some mitigating circumstances set forth in the statute." (TT 3606), and in the sentencing order which discusses only those circumstances specifically enumerated in the statute. (TT 3803-3806).

The jury recommended death without specifying what aggravating or mitigating circumstances were found to be present or absent, and Petitioner was sentenced to death on April 21, 1975.

The trial court found four aggravating circumstances and no mitigating circumstances to be present: §921.141(5)(d)- that the capital felonies were committed during a kidnap and/or robbery; §921.141(5)(e) - that the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest; §921.141(f) - committed for pecuniary gain; §921.141(h)- especially heinous, atrocious or cruel. (TT 3803). The court observed that, because the victims had died instantly, it was "a close question" on heinous, atrocious or cruel, but found this circumstance because of the probable strain attendant to being kidnapped. (TT 3804).

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* TT refers to the transcript of the trial.

The federal question of whether a sentence of death violates the Eighth and Fourteenth Amendments where consideration of mitigating evidence is limited only to that relevant to circumstances specifically enumerated in the statute was raised at Paragraphs 20(A)(3) and (C)(2) of the Motion for Post-Conviction Relief. It was raised again in the Petition for Rehearing.

The federal question of whether a sentence of death violates the Eighth and Fourteenth Amendments where it is predicated upon a combination of constitutionally impermissible aggravating circumstances and circumstances without sufficient evidence was raised at Paragraphs 20(D)(4)(a)-(e) and 20(B)(4) and (5) of the Motion for Post-Conviction Relief.

Both claims were rejected on the merits by the Supreme Court of Florida:

> Two other issues raised by the motion - that the sentence of death is an arbitrary application of the death penalty law and that capital punishment is imposed on black offenders in a racially discriminatory manner - may be summarily rejected on their merits. Thomas v. State, 421 So.2d 160 (Fla. 1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).
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> Muhammad v. State, 426 So.2d at 536.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO CONSIDER WHETHER THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED TO PETITIONER AS A MATTER OF LAW RESTRICTED CONSIDERATION OF MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

By its wording, §921.141, Florida Statutes, appears to limit the consideration of mitigating circumstances to those enumerated in the statute. In discussing the advisory sentence by the jury, the statute explains that the jury must determine "whether sufficient mitigating circumstances exist as enumerated in subsection (7)."* §921.141 (2)(b), Florida Statutes (1973). The statute requires the trial court in its written findings in support of a death sentence to show "that there are insufficient mitigating circumstances, as enumerated in subsection (7),"** to outweigh the aggravating circumstances. The roster of aggravating circumstances is "limited to the following. . ." Mitigating circumstances "shall be the following. . ." §921.141 (5) and (6). Thus, the wording of the statute would lead counsel and the court to believe that the legislature intended a limited list of both aggravating and mitigating circumstances in order properly to channel the sentencer's discretion as required by Furman v. Georgia, 408 U.S. 238 (1972).

In the first post-Furman decision of the Supreme Court of Florida, the court discussed the legislative intent to "provid[e] a system whereby the possible aggravating and mitigating circumstances are defined." State v. Dixon, 283 So.2d 1,7 (Fla. 1973).

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* Should read (6)
** Should read (6)

> The most important safeguard presented in Fla.Stat. §921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed.
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> * * *
>
> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. §921.141(7), F.S.A.

Dixon, 283 So.2d at 8-9.

The Dixon court discussed each of the circumstances enumerated in the statute, and no others. "The first mitigating circumstance. . ." is lack of significant history of criminal activity." Finally, "the age of the defendant may be considered." Dixon, 283 So.2d at 9-10.

The trial court in Petitioner's case clearly believed the list of mitigating circumstances to be exclusive and he so instructed the jury. He told defense counsel that they had a burden to prove some of the circumstances enumerated in the statute. Although there was at least one witness who could have testified about Petitioner's family history of poverty, child abuse, incest, and mental illness, that witness' testimony was excluded as irrelevant during guilt phase and not introduced during penalty phase. The jury was instructed that it could consider "mitigating circumstances... as follows..." and it was read the statutory circumstances. The court's Order upon sentencing considers and rejects only the specifically enumerated factors.

This court explained in Lockett v. Ohio, 438 U.S. 586 (1978), its assumption in Proffitt v. Florida, 428 U.S. 242 (1976), that the range of mitigating factors listed in the Florida statute was not exclusive. Lockett, 438 U.S. at 606. Less than a week after this court decided Proffitt, however, The Supreme Court of Florida decided Cooper v. State, 336 So.2d

1133 (Fla. 1976), and stated explicitly that the statutory mitigating circumstances were exclusive.

Cooper had proffered testimony during penalty phase about his employment, the victim's reputation for violence, and Cooper's attempts to avoid the victim on prior occasions. The evidence was excluded as irrelevant. The Supreme Court of Florida affirmed:

> We held in State v. Dixon that the rules of evidence are to be relaxed in the sentencing hearing, but that evidence bearing no relevance to the issues was to be excluded. The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
>
> * * *
>
> As to proffered testimony concerning Cooper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not a guarantee that one will be law-abiding. Cooper has shown that by his conduct here. In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.
>
> Cooper, 336 So.2d at 1339, footnotes omitted, emphasis added.

This Court in Lockett v. Ohio, 438 U.S. 586 (1978), reaffirmed in Eddings v. Oklahoma, 455 U.S. 104 (1982), required that the sentencer not be precluded from considering in mitigation any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

The clear discrepancy between Cooper and the Constitutional mandate of Lockett was brought to the attention of the Supreme Court of Florida in Songer v. State, 365 So.2d 696 (Fla. 1978). The court on rehearing said that Cooper was "not apropos [sic] to the problems addressed in Lockett," and that "the list of mitigating factors is not exhaustive." Songer, 365 So.2d at 700.

A year later, in Ford v. State, 374 So.2d 496 (Fla. 1979), the Supreme Court of Florida again reverted to its Cooper language that the legislature had limited the mitigating circumstances that could be considered:

> We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitigation during the sentencing trial. We do not pretend to know what motivated Alvin Bernard Ford to take the life of Dimitri Walter Ilyankoff. Our duty under section 921.141, Florida Statutes (1975), as upheld by the United States Supreme Court in Proffitt v. State . . . is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry to the facts of the capital cases which come before us.
>
> Ford, 374 So.2d at 503.

Most recently, in its opinion below, the Supreme Court of Florida conceded that Lockett was not the law of Florida at the time of Petitioner's trial. Petitioner had argued that there was other available mitigating evidence - some relevant to circumstances not listed in the statute - which counsel should have presented. The Supreme Court of Florida rejected the claim because "[i]t presupposes that counsel was expected to predict the decision in Lockett v. Ohio." Muhammad, 426 So.2d at 538. Clearly, if counsel is not expected to "predict" Lockett, then Lockett changed Florida law.

Petitioner submits that the Florida death-sentencing statute as applied to him as a matter of law restricted consideration of mitigating circumstances in violation of the Eighth and Fourteenth Amendments and this court's decision in Lockett.

II. THE COURT SHOULD GRANT THE WRIT TO CONSIDER WHETHER A DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT IS BASED UPON FACTORS NOT INCLUDED IN THE LIST OF STATUTORY AGGRAVATING CIRCUMSTANCES WHICH ARE AS A MATTER OF LAW INAPPLICABLE OR FACTUALLY INSUFFICIENT.

The second issue Petitioner raises is presently before this court in Barclay v. Florida, No. 81-6908, cert. granted, ___U.S._____, 103 S.Ct. 340 (1982).

Here, as in Barclay, the sentencing judge used constitutionally improper legal standards in his findings of two of the four aggravating circumstances on which Petitioner's death sentence was based and made those findings without constitutionally sufficient evidentiary support. Furthermore, each circumstance stems not from the facts of this particular crime but from factors inherent in all kidnap/murders. Two aggravating circumstances reside in the elements of the crime - first, that a kidnap was involved and, second, that pecuniary gain was a motive. A third, "heinous, atrocious or cruel" was found also because of the kidnap.

With respect to two aggravating circumstances found by the trial judge - killing during the commission of another felony and pecuniary gain - the Supreme Court of Florida has held that both cannot be found where the felony cited for the first is a felony, such as robbery, which inherently involves an attempt to realize pecuniary gain. Provence v. State, 337 So.2d 783 (Fla. 1976). The sentencing judge improperly used the same set of facts to support two separate aggravating circumstances, Sections 921.141(5)(d) and (f), Florida Statutes (1973), in violation of state law and constitutional provisions guaranteeing due process of law and prohibiting double jeopardy or sentences which are excessive or disproportionate. Provence v. State, 336 So.2d 783 (Fla. 1976). The jury was not instructed that it could not use the

same set of facts to support multiple aggravating circumstances.

Furthermore, the sentencing judge's use, as an aggravating circumstance, of the underlying felony upon which the felony-murder conviction in this case was based, where such circumstances would apply to every felony-murder situation, defeats the purpose of the statutory aggravating circumstances to confine and channel capital sentencing discretion, and therefore violates Furman v. Georgia, 408 U.S. 238 (1972).

A third factor found by the trial court was that the offense was "especially heinous, atrocious or cruel", Section 921.141 (5)(h), Florida Statutes (1973). In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court held that a sentence of death could not be premised on an aggravating circumstance similar in all material respects to (5)(h) unless four requirements are satisfied, at least two of which were violated in Petitioner's case (1) the record must contain evidence sufficient to prove beyond a reasonable doubt some "torture" or pitiless infliction of unnecessary pain and (2) a state appellate court must have expressly reviewed the record on appeal under the proper limiting definition to assure that the evidence supports the finding of the aggravating circumstance.

In support of a finding of "heinous, atrocious or cruel" in Petitioner's case, the sentencing judge found that "the hours preceding the actual killings constituted exceedingly cruel treatment of the victims, because of the "probabl[e]" strain and fear attendant to being kidnapped. There was absolutely no evidence regarding the victims' emotional state or anticipation of physical harm, and the sentencing judge had in fact ruled during trial that testimony regarding strain and fear before the homicides must be excluded as

purely speculative. The sentencing judge also used the victim's commendable behavior during the offense to support the finding, a factor which it totally irrelevant.

The record in this case contains absolutely no evidence of torture or the pitiless infliction of unnecessary pain, and no rational trier of fact, based on the record, could find beyond a reasonable doubt that torture or the infliction of unnecessary pain played any role in the offense. In fact, the sentencing judge stated that, "It might be considered a close question as to whether these murders were especially heinous, atrocious or cruel because of the fact that when the defendant killed the victims, death was almost instantaneous." The Supreme Court of Florida, in reviewing Petitioner's death sentence, merely quoted from the trial judge's sentencing order without determining whether the offense involved torture or the pitiless infliction of unnecessary pain. Knight v. State, 338 So.2d 201 (Fla. 1976).

A fourth aggravating circumstance was found to reside in the fact that since the victims were dead, they were unable to identify Petitioner to the authorities. Thus, the court reasoned, the slayings had been committed for "the purpose of avoiding or preventing a lawful arrest." The Supreme Court of Florida has said, in Riley v. State, 336 So.2d 19 (Fla. 1978), that in order for this circumstance to apply to a person who is not a law enforcement officer, it must be shown, as in Riley, that the facts admit of only one interpretation. In Riley, the victims were well-known to the defendant and they had been rendered helpless before they were killed. Additionally, an eyewitness (also an intended victim) testified that the defendant and his accomplice had expressed concern about identification just

before the killings took place.

Here, the President of the bank where the victim went to get the demanded money testified that the victim told him he did not know who his abductor was. He could give no description other than that he was Black. These facts are more akin to those in Gibson v. State, 351 So. 2d 948 (Fla. 1977) where the trial court found that, "The murder had the purpose of silencing the victims of the robbery. It was not, however, directly committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." Gibson, 351 So.2d at 951, n. 5.

Compounding these errors, the prosecutor's argument to the jury makes it clear that the jury recommendation and the court's order may have been based on legally impermissible factors.

The prosecutor improperly argued that death ought to be imposed based on an aggravating circumstance not enumerated in the statute and which, therefore, could not under state law be considered, i.e., lack of remorse. Menendez v. State, 368 So.2d 1278 (Fla. 1979). Furthermore, the prosecutor's argument was not based on evidence but on his personal opinion regarding Petitioner's statements during the psychiatric interviews conducted before trial.

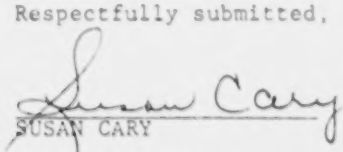
The prosecutor also improperly argued that three of the aggravating circumstances, "great risk of death to many persons" Section 921.141(5)(c), avoid arrest (5)(e) and hinder law enforcement (5)(g) were present in this case, despite the fact that the definitions of those circumstances under state law make them clearly inappropriate. (See e.g., Kampff v. State, 371 So.2d 1007 (Fla. 1979), Menendez v. State, 368 So.2d 1278 (Fla. 1979)).

Thus, Petitioner's death sentence was based upon constitutionally impermissible factors and it should not be permitted to stand.

CONCLUSION

For the reasons mentioned above, Petitioner respectfully prays that this Petition for Writ of Certiorari be granted to correct the errors below.

Respectfully submitted,



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respondents of the authority to represent the plaintiffs in a class action.

[1] Pursuant to the Supreme Court ruling in *Branti v. Finkel*, 445 U.S. 507, 519, 100 S.Ct. 1287, 1295, 63 L.Ed.2d 574 (1980), we understand that "[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State." The Florida Statutes remind us that the public defender does not owe any responsibility to persons other than those whom he is appointed to represent and he is not authorized by statute to undertake representation of any such additional persons. He therefore cannot undertake representation of a class.

Our reasoning in the case at bar parallels that which was used in our decision of *Graham v. State*, 372 So.2d 1363 (Fla.1979). There, we concluded that the state of Florida is under no obligation to provide the counsel or costs in federal proceedings.

The decision to file this federal complaint as a class action suit is said to be a tactical move on the part of the respondents. Respondents have based their decision on the likelihood of obtaining relief for both G.A. and other individuals. The mere fact that a decision is tactical is of no import. Invariably, the respondents must still have the authority to act and here they simply do not.

This does not mean, however, that state-appointed counsel could not continue their representation and seek federal relief on an "individual" basis. A lawyer's professional responsibility may dictate this action. It is, however, our view that a state court could not mandate this action.

The state is constitutionally obliged to respect the professional independence of the public defenders whom it engages. The decision in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), established the right of state criminal defendants to the "[g]uiding hand of counsel at every step of the proceedings against [them]." *Id.* at 345, 83 S.Ct. at 797 (quoting from *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932)).

[2] The United States Supreme Court opinion in *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), concisely summarizes this Court's view concerning the primary purpose of the public defender. Quoting from *Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979), the Court agreed that

> His [the public defender's] principal responsibility is to serve the undivided interests of *his* client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.

102 S.Ct. at 450 n. 8 (emphasis supplied).

The petition for writ of quo warranto is hereby granted by this Court.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.

Askari Abdullah MUHAMMAD, formerly known as Thomas Knight, Appellant,

v.

STATE of Florida, Appellee.

No. 61454.

Supreme Court of Florida.

Dec. 16, 1982.

Rehearing Denied March 2, 1983.

Appeal was taken from order of the Circuit Court, Dade County, Gene Williams, J., denying without hearing motion to vacate judgment and sentence. The Supreme Court held that defendant was not denied effective assistance of counsel.

Affirmed.

McDonald, J., dissented and filed statement.

Overton, J., dissented and concurred with McDonald, J.

1. Criminal Law ⇐998(19)

If motion for postconviction relief and record and files of case conclusively show that movant is not entitled to relief, motion may be denied without an evidentiary hearing.

2. Criminal Law ⇐998(3)

Allegations that trial court erred in excluding testimony of defense witness and in failing to instruct jury on consequences of verdict of not guilty by reason of insanity could have been raised on initial appeal and therefore were not proper matters to be considered on motion for postconviction relief.

3. Criminal Law ⇐998(14)

Specific omission or overt act upon which claim of ineffective assistance of counsel is based must be detailed in appropriate pleading. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐998(16)

Defendant alleging ineffective assistance of counsel has burden to show that specific omission or overt act of attorney was substantial and serious deficiency measurably below that of competent counsel. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐998(16)

Defendant alleging ineffective assistance of counsel has burden to show that attorney's specific, serious deficiency, when considered under circumstances of individual case, was substantial enough to demonstrate prejudice to defendant to the extent that there is likelihood that deficient conduct affected outcome of court proceedings and in cases of appellate counsel that means deficiency must concern issue which is error affecting outcome, not simply harmless error. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐998(16)

In the event defendant alleging ineffective assistance of counsel does show substantial deficiency and presents prima facie showing of prejudice, state still has opportunity to rebut those assertions by showing beyond a reasonable doubt that there was no prejudice in fact and opportunity to rebut applies even if constitutional violation has been established. U.S.C.A. Const. Amend. 6.

7. Criminal Law ⇐641.13(2)

Defendant was not denied effective assistance of counsel, although defendant contended trial lawyer adequately failed to present evidence of pretrial publicity, failed to preserve record for appeal of denial of venue motion, and failed to request individualized, sequestered examination of prospective jurors where trial defense counsel presented evidence of pretrial publicity, defense counsel questioned prospective jurors extensively regarding pretrial publicity, and with respect to assertion that defense counsel failed to preserve record for appeal of denial of venue motion, neither motion for postconviction relief nor defendant's brief was sufficiently definite about what specific act or omission was. U.S.C.A. Const. Amend. 6.

8. Criminal Law ⇐641.13(6)

Record supported trial court's conclusion in criminal prosecution that defense counsel adequately investigated, prepared and presented evidence concerning defendant's psychiatric problems, and thus, defendant was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐641.13(2)

Since there was sufficient proof of premeditation, omission of jury instruction upon elements of underlying felony was not error and omission of objection thereto was not deficiency which would render assistance of counsel ineffective. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(2)

Defense counsel was not defective in not requesting instruction on consequences of verdict of not guilty by reason of insanity. U.S.C.A. Const.Amend. 6.

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11. Criminal Law ⇐641.13(2)

Since defendant was not entitled to jury instructions he contended defense counsel should have requested in criminal prosecution, trial counsel could not be judged deficient for not requesting them. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(7)

Defense counsel was not ineffective at sentencing phase of trial in not presenting evidence of nonstatutory mitigating considerations based on defendant's character and background. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(2)

None of remarks of prosecutor in closing argument were so improper and prejudicial as to have required declaring a mistrial; thus, defense counsel was not ineffective for failing to object to remarks, but rather, whether to object was matter of trial tactics left to discretion of attorney so long as his performance was within range of what was expected of reasonably competent counsel. U.S.C.A. Const.Amend. 6.

Susan Cary, Gainesville, for appellant.

Jim Smith, Atty. Gen. and Calvin L. Fox, Asst. Atty. Gen., Miami, for appellee.

PER CURIAM.

Askari Abdullah Muhammad, formerly known as Thomas Knight, appeals the denial without a hearing of his motion to vacate judgment and sentence filed pursuant to Florida Rule of Criminal Procedure 3.850. Since we find that the motion and the files and records in the case conclusively show that appellant is not entitled to relief, we affirm the trial court's action denying the motion without an evidentiary hearing. *See Foster v. State*, 400 So.2d 1 (Fla.1981); *Meeks v. State*, 382 So.2d 673 (Fla.1980); *Graham v. State*, 372 So.2d 1363 (Fla.1979).

Appellant was convicted of two counts of first-degree murder and was sentenced to death. He appealed, and this Court affirmed the convictions and sentences. *Knight v. State*, 338 So.2d 201 (Fla.1976). Later appellant filed a petition for a writ of habeas corpus with this Court, alleging ineffective assistance of appellate counsel. In that case we announced a set of standards for evaluating a claim of denial of effective assistance of counsel and, applying the standards, we denied the petition. *Knight v. State*, 394 So.2d 997 (Fla.1981).

Appellant then filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida, raising several federal constitutional questions. The federal district court found that appellant had exhausted possible state remedies as to all the questions raised except for his assertion that he had received ineffective assistance of counsel at his trial. The district court entered an order retaining jurisdiction for the purpose of continuing a previously entered stay of execution provided appellant should promptly seek available state remedies on his claim. *Knight v. Wainwright*, 399 So.2d 1143 (S.D. Fla.1981).

Appellant then filed the instant Rule 3.850 motion with the court in which he was tried and sentenced. The motion stated nine grounds for relief. The court ordered the parties to submit memoranda on the question of the need for an evidentiary hearing on the issue of denial of effective assistance of trial counsel, but summarily ruled against appellant on the remaining eight grounds. After considering the arguments of the parties, the court found that an evidentiary hearing was not necessary and denied the motion to vacate judgment and sentence.

[1] In the present appeal appellant challenges the summary denial of his motion for post-conviction relief. There is little question that eight of the nine grounds appellant raised were properly denied without a hearing. If the motion and the record and files of the case conclusively show that the movant is not entitled to relief, the motion may be denied without an evidentiary hearing. *Foster v. State*, 400 So.2d 1 (Fla.1981).

[2] Two of the grounds of the motion—that appellant was denied a fair trial by an impartial jury and that he had a right to

notice of whether the state would prosecute on the ground of premeditation or felony murder—were raised and decided adversely to appellant in his initial appeal. *See Knight v. State*, 338 So.2d 201 (Fla.1976). Two other grounds—that the trial court failed to instruct the jury on the underlying felony of the felony murder charge and that appellant was denied the right to effective appellate review—were decided adversely to appellant when he sought a writ of habeas corpus from this Court, *Knight v. State*, 394 So.2d 997 (Fla.1981), and will not be reconsidered now. Two other grounds—that the court erred in excluding the testimony of a defense witness and erred in failing to instruct the jury on the consequences of a verdict of not guilty by reason of insanity—are issues that could have been raised on the initial appeal and are therefore not proper matters to be considered on a motion for post-conviction relief. *See Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980); *Sullivan v. State*, 372 So.2d 938 (Fla.1979). Two other issues raised by the motion—that the sentence of death is an arbitrary application of the death penalty law and that capital punishment is imposed on black offenders in a racially discriminatory manner—may be summarily rejected on their merits. *Thomas v. State*, 421 So.2d 160 (Fla.1982); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

[3–6] The remaining ground put forth by the motion is the allegation that appellant was deprived of the right to effective assistance of counsel at his trial. There are four requirements that such a motion must meet in order for appellant to be entitled to relief:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in [*United States v. Decoster*] *Decoster III*: "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d [196] at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions.
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established.

Knight v. State, 394 So.2d at 1001 (footnote omitted). The court below considered appellant's allegations in light of the above-quoted requirements and provided a detailed written analysis of the contentions. Assuming, for purposes of argument on the motion, that the allegations were true, the court nevertheless concluded:

> A. The allegations of the motion, either singly or as a whole, do not allege an egregious incompetency, falling measurably below that which might be expected from an ordinary fallible lawyer, or probably prejudicial;

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B. The allegations, even if proved, would not demonstrate that the alleged deficiencies likely deprived defendant of an otherwise available, substantial ground of defense;

C. The file and records of the case conclusively show that defendant's trial counsel was reasonably to render [sic] and did render reasonably effective counsel based on the totality of the circumstances;

D. The motion and the files and records of the case conclusively show that the defendant is entitled to no relief . . . .

[7] The motion presented numerous asserted specific acts or omissions which appellant says constituted deficiencies in his trial counsel's performance. Regarding the problem of pretrial publicity, appellant says that his trial lawyer failed to adequately present evidence of prejudicial publicity, failed to preserve the record for appeal of the denial of the motion for change of venue, and failed to request individualized, sequestered examination of prospective jurors. As we held in the original appeal, however, the crucial issue is not the amount of publicity but whether the accused is tried by a jury of impartial, indifferent jurors. *Knight v. State*, 338 So.2d 201, 203 (Fla. 1976). The record shows that trial defense counsel did present evidence of pretrial publicity in support of the motion for change of venue. The denial of the motion for change of venue was reviewed and affirmed on appeal. *Id.* The record also shows that defense counsel questioned prospective jurors extensively regarding any influence the pretrial publicity may have had on them. With reference to the charge that defense counsel omitted to request sequestered and individual examination of prospective jurors, "it must be recognized that the methods of jury voir dire are subjective and individualistic." *Meeks v. State*, 418 So.2d 987, 988 (Fla.1982). We do not find counsel's choice of tactics on this matter to have been a deficiency measurably below the standard expected. *See Lewis v. State*, 398 So.2d 432 (Fla.1981); *Washington v. State*, 397 So.2d 285 (Fla. 1981); *McNeal v. State*, 409 So.2d 525 (Fla. 5th DCA), *rev. denied*, 413 So.2d 876 (Fla. 1982). Regarding the assertion that defense counsel failed to preserve the record for appeal of the denial of the motion for change of venue, neither the motion for post-conviction relief nor the appellant's brief is sufficiently definite about what the specific act or omission is.

[8] The next deficiency appellant asserts is that counsel failed to adequately investigate, prepare, and present evidence concerning appellant's psychiatric problems. The failure, appellant contends, prejudiced him at both the guilt and penalty phases of the trial. Appellant alleges that counsel did not learn about a psychological examination conducted by Dr. David Rothenberg until a few days before trial, failed to present evidence of the abusive behavior of appellant's father during his childhood and the effect on appellant's personality, and failed to fully prepare Dr. Rothenberg to testify. In finding that counsel had fully and adequately presented an insanity defense, the judge below relied upon his own recollection of what occurred at the trial. *See Friedman v. United States*, 588 F.2d 1010 (5th Cir.1979); *Farrow v. United States*, 580 F.2d 1339 (9th Cir.1978); *Panico v. United States*, 412 F.2d 1151 (2d Cir. 1969), *cert. denied*, 397 U.S. 921, 90 S.Ct. 901, 25 L.Ed.2d 102 (1970). In its order the trial court said:

> Dr. Rothenberg testified at the trial for more than a day, as shown by approximately 300 pages of testimony, concerning his several examinations of defendant, tests given to defendant, together with his findings and opinions. Nowhere in his extensive testimony does Dr. Rothenberg give the slightest hint that he lacked and "needed" background information about defendant or his family; nor copies of reports of the State's expert witnesses; nor that he was handicapped by lack of access to tapes of his interviews with defendant. As a matter of fact, he testified in a very positive manner concerning his opinion that defendant was not competent at the time of the

murders, and gave lengthy reasons for his opinion. He referred to copious notes that he had taken. He even testified that he did not need to hear the tapes to refresh his recollection, although the tapes were played during his testimony and he testified concerning them.

Defense attorney Meadows interrogated Dr. Rothenberg thoroughly and knowledgably. This was no matter of course, ho-hum interrogation. A reading of the transcript makes it obvious that Mr. Meadows had thoroughly prepared the examination of the psychologist.

Since the record supports the trial court's conclusions, we agree that defense counsel was not ineffective in this respect. *See Foster v. State*, 400 So.2d 1 (Fla.1981); *Washington v. State*, 397 So.2d 285 (Fla. 1981); *Alvord v. State*, 396 So.2d 184 (Fla. 1981).

[9–11] Appellant's next contention regarding ineffectiveness of counsel is that his lawyer failed to object to improper jury instructions at the guilt and penalty phases of the trial. Appellant says that his lawyer was deficient in failing to request an instruction upon the elements of the underlying felony. However, we have already held that there was sufficient proof of premeditation. *Knight v. State*, 338 So.2d at 204. Therefore the omission of the instruction was not error and the omission of an objection thereto was not a deficiency. Appellant also contends that counsel was defective in not requesting an instruction on the consequences of a verdict of not guilty by reason of insanity. A defendant's right to such an instruction had not yet been established at the time of appellant's trial. *See Roberts v. State*, 335 So.2d 285 (Fla.1976). Therefore appellant's argument places upon defense lawyers the duty of anticipating changes in the law and is without merit. *See Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970); *Alvord v. State*, 396 So.2d 184 (Fla.1981); *Knight v. State*, 394 So.2d 997 (Fla.1981); *Meeks v. State*, 382 So.2d 673 (Fla.1980). With regard to the remaining assertions of ineffectiveness in failure to request jury instructions, appellant has failed to show that he was entitled to receive the instructions in question. Since appellant was not entitled to receive the instructions, trial counsel cannot be judged deficient for not requesting them.

[12] Appellant next argues that defense counsel was ineffective at the sentencing phase of the trial in that he did not present evidence of nonstatutory mitigating considerations based on appellant's character and background. This contention is without merit. It presupposes that counsel was expected to predict the decision in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *See Ford v. State*, 407 So.2d 907 (Fla.1981).

[13] Finally, appellant argues that his lawyer was ineffective in not objecting to certain remarks made by the prosecutor in closing argument which appellant says were improper. After reviewing the record, we find that none of the remarks were so improper and prejudicial as to have required declaring a mistrial. In such instances, an attorney may decide that it is better not to object to the remark and ask for a curative instruction, because to do so would only further call the jury's attention to the improper remarks. Whether to object is a matter of trial tactics which are left to the discretion of the attorney so long as his performance is within the range of what is expected of reasonably competent counsel. We therefore find no deficiency in trial counsel's not objecting to the prosecutor's remarks. *See generally Washington v. State*, 397 So.2d 285 (Fla.1981); *McNeal v. State*, 409 So.2d 528 (Fla. 5th DCA), *rev. denied*, 413 So.2d 876 (Fla.1982); *Ferby v. State*, 404 So.2d 407 (Fla. 5th DCA 1981).

In conclusion, we agree with the trial court that appellant, even if he had proved all the factual allegations of his motion, would have been unable to establish that any act or omission of his trial counsel was a substantial deficiency measurably below the standard of performance expected of competent counsel. Since the motion and the record conclusively showed that appellant was entitled to no relief, the trial judge

was correct in denying the motion without holding an evidentiary hearing. The court's order is therefore affirmed.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD and EHRLICH, JJ., concur.

McDONALD, Justice, dissenting:

"I feel that there are sufficient allegations which are not rebutted by the record to require an evidentiary hearing on the claim of ineffective assistance of counsel in the sentencing phase."

OVERTON, J., dissents and concurs with McDONALD, J.

Richard J. OSTERNDORF, et al., Petitioners,

v.

John TURNER, et al., Respondents.

No. 61948.

Supreme Court of Florida.

Dec. 16, 1982.

On Rehearing Feb. 3, 1983.

Proceeding was brought by homeowners who had resided in Florida for less than five years challenging five-year residency prerequisite to their entitlement to $25,000 homestead tax exemption for 1982. The Circuit Court, Volusia County, John J. Upchurch, J., held statute constitutional, and homeowners appealed. The District Court of Appeal, 411 So.2d 330, affirmed and certified questions, and homeowners petitioned for review. The Supreme Court, Overton, J., held that: (1) homestead statute violates equal protection to extent that it prohibits residents of less than five years' residency from receiving enhanced $25,000 homestead tax exemption; (2) $25,000 exemption is applicable to all bona fide permanent residents; (3) decision is prospective only for taxable year commencing January 1, 1983, except for taxpayers who timely challenged residency requirement; and (4) five-year residency requirement for $25,000 exemption for school district taxes is also unconstitutional.

District court decision quashed and case remanded.

Alderman, C.J., filed a dissenting opinion in which Adkins, J., joined, and also filed an opinion dissenting in part on rehearing.

Adkins, J., dissented on rehearing.

1. Constitutional Law ⇐18

Federal cases on residency requirements, which are controlling on federal issues, are also relevant and persuasive on issue whether Florida's equal protection clause has been violated. West's F.S.A. Const. Art. 1, § 2.

2. Constitutional Law ⇐229(2)

Florida's equal protection clause does not allow the legislature to establish two classes of permanent residents for homestead tax exemption. West's F.S.A. Const. Art. 1, § 2, Art. 7, § 6(d); West's F.S.A. § 196.031(3)(e).

3. Constitutional Law ⇐229(2)

There is no rational basis for distinguishing between bona fide residents of more than five consecutive years and bona fide residents of less than five consecutive years in payment of taxes on their homes under equal protection clause. West's F.S.A. Const. Art. 1, § 2, Art. 7, § 6(d); West's F.S.A. § 196.031(3)(e).

4. Taxation ⇐40(6)

State is constitutionally prohibited from imposing different taxes on its citizens based solely on their length of permanent residence in state.

Having considered the pleadings and evidence, the referee found as follows:

Under Case No. 06C78002

As employee of the law firm of Duggar & Ryan, P.A., William R. Ryan wrongfully took $20,000.00 belonging to the law firm for his own personal use.

This act constituted a felony under Florida Statute 812.021, and under date of October 27, 1976, a pretrial intervention agreement was reached between the Respondent and the State Attorney under Florida Statute 944.025 and approved by the Circuit Judge. The Respondent admitted his guilt and the agreement provided that the Respondent was to make restitution of $20,000.00, of which only $17,500.00 has been made prior to the hearing.

Under Case No. 06C78006

On March 16, 1978, the Third Statewide Grand Jury filed its indictment against the Respondent on felony charges of bringing marijuana into the State of Florida, possession of marijuana and conspiracy to possess more than 100 pounds of marijuana with intent to sell.

A bond of $100,000.00 initially set was reduced to $50,000.00 and was then posted by Mr. Ryan. He failed to appear in court to enter a plea as required and disappeared. The bond was estreated and an order entered October 11, 1978 denying the Second Motion to Set Aside Bond Estreature.

The referee recommends that respondent in Case No. 06C78002 be found guilty of violating The Florida Bar Integration Rule 11.02(3)(a) and Code of Professional Responsibility, Disciplinary Rules 1-102(A)(3), (4) and (6), and in Case No. 06C78006 be found guilty of violating The Florida Bar Code of Professional Responsibility, Disciplinary Rules 1-102(A)(5) and (6) and Ethical Consideration 1-5. The referee further recommends that respondent be disbarred.

Having carefully reviewed the record, we approve the findings and recommendations of the referee.

Accordingly, respondent, William R. Ryan, is hereby disbarred from the practice of law in the State of Florida.

Costs in the amount of $713.83 are hereby taxed against the respondent.

It is so ordered.

ADKINS, Acting C. J., and BOYD, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

Thomas KNIGHT, Petitioner,

v.

STATE of Florida, Respondent.

No. 59741.

Supreme Court of Florida.

Feb. 24, 1981.

Defendant, who had been convicted of murder and sentenced to death, submitted petition for writ of habeas corpus predicated on assertion of ineffective assistance of appellate counsel. The Supreme Court held that there was no substantial deficiency in representation of defendant on appeal by which defendant was prejudiced.

Petition denied.

Sundberg, C. J., concurred in result only.

1. Criminal Law ⇐641.13(1)

On assertion of ineffectiveness of counsel, specific omission or overt act upon which claim of ineffective assistance of counsel is based must be detailed in appropriate pleading. U.S.C.A.Const. Amend. 6.

2. Criminal Law ⇐641.13(1)

On assertion of ineffectiveness of counsel, defendant has burden to show that specific omission or overt act upon which claim is based was substantial and serious defi-

ciency measurably below that of competent counsel. U.S.C.A.Const. Amend. 6.

3. Criminal Law ⇐641.13(1)

On assertion of ineffectiveness of counsel, defendant has burden to show that specific omission or overt act which constituted specific, serious deficiency measurably below that of competent counsel, when considered under circumstances of individual case, was substantial enough to demonstrate prejudice to defendant to extent that there is likelihood that deficient conduct affected outcome of court proceedings. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐641.13(1)

On assertion of ineffectiveness of counsel, once defendant has shown substantial deficiency in representation of counsel and presents prima facie showing of prejudice, state has opportunity to rebut these assertions by showing beyond reasonable doubt that there was no prejudice in fact; such opportunity to rebut applies even if a constitutional violation has been established. U.S.C.A.Const. Amend. 6.

5. Criminal Law ⇐1038.3

Where there is sufficient evidence of premeditation as respects murder arising out of felony, failure to give underlying felony instruction, where it has not been requested, is not error which mandates reversal absent showing of prejudice.

6. Criminal Law ⇐641.13(7)

Failure of appellate counsel, who was also trial counsel, to raise as error on appeal of conviction of murder failure to either request instruction on elements of underlying felony, or to object to failure to give such instruction, was not omission that was serious deficiency in representation of counsel, and did not prejudice defendant. U.S.C.A.Const. Amend. 6.

7. Criminal Law ⇐641.13(1)

There is no requirement that counsel, to be reasonably effective, must anticipate changes in law. U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇐641.13(7)

Failure of appellate counsel to raise as error on appeal of conviction of murder failure to request instruction on consequences of verdict of not guilty by reason of insanity, based on assertion that counsel should have anticipated Supreme Court's adoption of rule of law not dictated by United States Supreme Court, United States Constitution, or State Constitution, nor applied retroactively to any pending decisions except those in which that issue had been preserved and which were actually pending on appeal, was not omission that was substantial deficiency in representation of counsel, and no prejudice stemmed from failure to raise issue. U.S.C.A.Const. Amend. 6.

9. Criminal Law ⇐641.13(7)

Failure of appellate counsel to raise as error on appeal of conviction of murder exclusion of testimony by lay witness offered at trial to show jury that, given family history of abuse and incest by father of defendant, feelings professed by defendant to expert witnesses about his father were in fact inappropriate, was not substantial deficiency in representation of counsel, and there was no prejudice to defendant. U.S.C.A.Const. Amend. 6.

10. Criminal Law ⇐641.13(7)

Failure of appellate counsel to argue improper doubling of aggravating circumstances and to properly present mitigating circumstances for reevaluation by Supreme Court was not substantial deficiency in appellate counsel, and demonstrated no prejudice to defendant. U.S.C.A.Const. Amend. 6.

Jesse J. McCrary, Jr., Miami, Fletcher N. Baldwin, Jr., and Susan Cary, Gainesville, for petitioner.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., Miami, for respondent.

PER CURIAM.

We have for consideration a petition for writ of habeas corpus by Thomas Knight

whose conviction and sentence of death were affirmed by this Court in *Knight v. State*, 338 So.2d 201 (Fla.1976). We originally transferred this petition to the Eleventh Judicial Circuit and directed that it be treated as a motion for post-conviction relief. The trial judge in considering the petition properly determined that since petitioner's claim for relief is predicated on the assertion of ineffective assistance of appellate counsel, such relief can only be granted by habeas corpus in the appellate court unless it was caused by an act or omission of the trial court. The ineffective assistance of counsel allegations stem from acts or omissions before this Court, and therefore we have jurisdiction and will consider the petition for habeas corpus on its merits.

The Governor has signed a death warrant for petitioner's execution, which has been set for March 3, 1981. We received a motion for stay of execution and supporting briefs from the petitioner, Knight, as well as the extensive legal arguments contained in the petition for writ of habeas corpus. The state has filed a responding brief, and the Court has heard oral argument in the cause.

In summary, and for the reasons hereafter expressed, we deny the petition for writ of habeas corpus. We find that counsel on the initial appeal for the petitioner was court appointed and his representation was a result of state action. We have considered each of the asserted failures and omissions of this appellate counsel and have determined that the assertions individually and collectively are without merit. We expressly find that none of the asserted failures or omissions establish a serious incompetency that falls measurably below the performance expected of appellate counsel and that these specific asserted failures or omissions did not affect the outcome of the appellate proceedings to the prejudice of the appellant. We reach this conclusion and finding after a review of not only the record on this petition for habeas corpus but also the record on the initial appeal to this Court.

I. *Facts in the Instant Case*

Because of the issues and circumstances in this proceeding, we restate the facts of this unusual and bizarre abduction and slaying.

On July 17, 1974, at approximately 8:00 a. m., one of the victims, Sydney Gans, left his wife at their home and drove his gold 4-door Mercedes to his business. As he began to get out of his car at his business, he was met by a black male who approached him with an automatic rifle and told him to get back into the car and drive to his residence and get his wife. The black male abductor got into the rear of the car and Mr. Gans drove back to his home and obtained his wife, who got into the front passenger seat. The black male abductor told Mr. Gans that he wanted $50,000. Mr. Gans drove to a bank in downtown Miami, got out of the car and went inside the bank while his wife moved into the driver's seat and began driving the car around the downtown area. Once inside the bank, Mr. Gans advised the president of the circumstances and the demand for $50,000. The president called the Federal Bureau of Investigation, which sent agents to the president's office and coordinated surveillance of the vehicle driven by Mrs. Gans with the City of Miami police department. Officers stationed in the vicinity of the bank, including an agent for the FBI, observed the Gans vehicle stopped at a traffic light and observed the weapon on the lap of the abductor in the rear seat. Mr. Gans received $50,000 in marked funds which were placed in a paper bag. He went outside and was picked up by his wife and the abductor. Surveillance units followed the Gans vehicle but lost it for about four or five minutes. Subsequently, two officers came upon the vehicle in a construction area with the front passenger door open, the right rear passenger door open, and the trunk open. As the officers approached the vehicle, they observed the back of a black male approximately 150 feet from the vehicle who turned and had a rifle-type weapon in his hands. No shots were fired, and the black male turned and ran into a thick growth of scrub trees and

bushes. The body of Mrs. Gans was found behind the steering wheel. The body of Mr. Gans was found lying about 25 feet from the vehicle. It appeared he had been dragged from the vehicle after he had been shot. Both died as a result of gunshot wounds perforating their necks, the fatal shots having apparently been fired from the rear seat of the Gans vehicle. A search of the surrounding area was commenced. Approximately four and a half hours later, the petitioner, Thomas Knight, was apprehended in a high weeded area about 2000 feet from the Gans vehicle. Underneath the petitioner when he was apprehended was an automatic rifle and a paper bag containing $50,000 buried in the dirt.

There were numerous law enforcement eyewitnesses to the events subsequent to Mr. Gans leaving the bank and immediately prior to the victims being killed. Four law enforcement officers positively identified Knight as being the abductor in the Gans vehicle. Knight's fingerprint was on the trunk of the vehicle.

The issue of the petitioner's competency at the time of the offense was presented to the jury. Five expert witnesses testified, four of whom rendered opinions that the petitioner was sane at the time of the offense. The fifth expert witness, presented on the behalf of the petitioner, believed Knight was not sane at the time of the offense and that he had a severe paranoid-schizophrenic mental conditio...

Four private attorneys were appointed to represent the petitioner at his trial, including a former United States District Attorney and a former Assistant United States District Attorney for the Southern District of Florida. One of the four trial counsel was also the counsel on appeal.

1. *See, e. g.*, Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 Am.Crim.L.Rev. 233 (1979); Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 Mo.L.Rev. 483 (1976).

2. *See, e. g., Taylor v. State*, 291 Ala. 756, 287 So.2d 901 (1973), *cert. denied*, 416 U.S. 945, 94 S.Ct. 1955, 40 L.Ed.2d 298 (1974); *People v. Pope*, 23 Cal.3d 412, 152 Cal.Rptr. 732, 590 P.2d 859 (1979); *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975); *State v. Hester*, 45 Ohio.2d 71, 341 N.E.2d 304 (1976); *Baxter v. Rose*, 523 S.W.2d 930 (Tenn.1975); *State v. Harper*, 57 Wis.2d 543, 205 N.W.2d 1 (1973). *See generally* Erickson, *supra* note 1.

II. *Effectiveness of Counsel Standards*

The state contends that petitioner's original counsel on appeal was in reality the same as privately retained counsel and that the standard for effective assistance of counsel under these facts, especially in light of this Court's mandatory review in death penalty cases, is not far above the "farce and mockery" test rejected for trial counsel effectiveness in *Meeks v. State*, 382 So.2d 673 (Fla.1980). We reject this contention by the state. Counsel who represented the petitioner on appeal was appointed by the trial court immediately following the sentencing. Although the petitioner did ask for the named appellate counsel to be appointed, it should be noted that this counsel was one of four appointed counsel who represented the petitioner at trial. In view of this holding, we need not address in this cause the differences, if any, in standards of competency between appointed and privately retained counsel.

Establishing the appropriate test or standard for determining reasonably effective assistance of counsel has been considered by some a bramble bush thicket. The United States Supreme Court has avoided speaking definitely on this issue. *See Maryland v. Marzullo*, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) (White and Rehnquist, JJ., dissenting). Numerous commentators have written recently on this issue.[1] Several courts have found guidance in the American Bar Association Standards for Criminal Justice ch. 4 (2d ed. 1980), relating to the function of defense counsel.[2]

In determining whether defendant has been provided with reasonably effective assistance of counsel, we believe the following four-step process encompassed in *United States v. DeCoster (DeCoster III)*, 624 F.2d 196 (D.C.Cir.1979) (en banc), provides a means to discover a true miscarriage of

justice and yet does not place the judiciary in the role of interfering with defense counsel's legal and tactical conduct at trial or on appeal. We adopt the following four principles as a standard to determine whether an attorney has provided reasonably effective assistance of counsel to his client.

[1] First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.

[2] Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in *DeCoster III*: "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.

[3] Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions.[3]

[4] Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *DeCoster III*.

III. *Habeas Corpus Disposition*

The petition for habeas corpus asserts that the briefs submitted to this Court on appeal were poorly written and failed to properly present the necessary legal issues to provide a fair review of petitioner's trial. The briefs by counsel on the initial appeal, while not a model of legal writing, did set forth 23 asserted points of error. In our opinion, reported at 338 So.2d 201, we expressly discussed issues concerning the partiality of a juror, the pervasiveness of the pretrial publicity, the denial of a change of venue, the admission of certain evidence as being part of the res gestae, the authority to prosecute upon felony murder when the indictment charged premeditated murder, and the appropriateness of the death sentence. Poor writing style is not a ground for relief.

The petitioner sets forth four legal errors which he contends his appellate counsel should have presented to this Court on appeal, arguing that the failure to present those issues to the Court resulted in his being denied reasonably effective assistance of counsel. The asserted legal errors con-

3. At least five circuit courts of appeals have indicated general agreement. *See Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1979), *vacated as moot*, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980), *on remand* 623 F.2d 366 (5th Cir. 1980); *Cooper v. Fitzharris*, 586 F.2d 1325, 1331-32 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979); *United States v. Cooper*, 580 F.2d 259, 263 n. 8 (7th Cir. 1978); *Harshaw v. United States*, 542 F.2d 455, 456-57 (8th Cir. 1976); *United States ex rel. Green v. Rundle*, 434 F.2d 1112, 1115-16 (3d Cir. 1970). *Contra, Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974), *but see United States v. Sumlin*, 567 F.2d 684, 689 (6th Cir. 1977), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 529 (1978). *See also Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.) (placing burden on government to show lack of prejudice), *cert. denied* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968). At least sixteen states have indicated agreement with the majority federal rule. *See* Erickson, *supra* note 1, at 249 n. 137.

cern: (1) the trial court's failure to instruct the jury on elements of the underlying felony; (2) the trial court's failure to instruct the jury on the result of a verdict of not guilty by reason of insanity; (3) the trial court's exclusion of the witness Pat Duval from testifying in the cause; (4) the trial court's application of the statutory aggravating and mitigating circumstances and its failure to find any mitigating circumstances.

We will address these points individually and apply the standards adopted in Part II to determine whether counsel for this petitioner provided reasonably effective assistance in the initial appeal.

The first issue concerns the trial judge's failure to instruct the jury on the elements of the underlying felony. The petitioner contends that our decision in *Robles v. State*, 188 So.2d 789 (Fla.1966), is determinative and that a trial court's failure to give an adequate instruction on the underlying felony is a fatal error even when such instruction has not been requested by the defendant. Subsequent to our opinion on the initial appeal in this cause, we decided *State v. Jones*, 377 So.2d 1163 (Fla.1979), which reaffirmed our decision in *Robles v. State*.

The record in the instant case reflects that the trial judge gave the general definitive instructions for homicide but did not specifically instruct upon the elements of the underlying felony of kidnapping or robbery. There was no request or objection by petitioner's trial counsel to this failure to give these instructions.

[5] It is clear that in both *Robles* and *Jones* the primary charge was felony murder and the state in neither case contended the evidence was sufficient to establish premeditated murder. We expressly noted in *Jones* that there was no contention that there was sufficient evidence to establish premeditated murder. We conclude that where there is sufficient evidence of premeditation, the failure to give the underlying felony instruction, where it has not been requested, is not error which mandates a reversal absent a showing of prejudice. *See Frazier v. State*, 107 So.2d 16 (Fla. 1958).

[6] We find the failure of appellate counsel, who was also trial counsel, to raise this issue is not an omission that was a serious deficiency, and we further find that no prejudice was shown. In fact, an argument could be made under the facts of this case that giving the underlying felony instruction would have been more of a detriment than a benefit to this petitioner. This stems from the fact that one of the arguments of the petitioner at trial was the lack of direct evidence that Knight actually killed the victims. Indeed, the record reflects that there was strong circumstantial evidence but no direct eyewitness evidence of the actual killings, in contrast to the considerable direct evidence, including numerous law enforcement eyewitnesses, that Knight was the perpetrator of the kidnapping and robbery.

However, the record in this cause, and in particular the final argument of counsel, demonstrates that the state, although it mentioned felony murder, strongly argued premeditated murder to the jury. The record reflects that there is not only sufficient but overwhelming evidence of premeditated murder. We find that under the circumstances of this case and our review of the record that neither *Robles* nor *Jones* applies, but *Frazier* does apply. We are satisfied beyond a reasonable doubt that the failure to give the instruction at issue was not prejudicial and did not contribute to the petitioner's conviction. *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[7, 8] The second identified failure of appellate counsel is the assertion that he should have anticipated this Court's ruling in *Roberts v. State*, 335 So.2d 285 (Fla. 1976), and requested an instruction on the consequences of the verdict of not guilty by reason of insanity. Our decision in *Roberts* was decided *subsequent* to trial, briefs and oral argument in this cause. In *Roberts* there was a specific request at the trial court level for the instruction, and we

adopted the rule of law expressed in *Lyles v. United States*, 254 F.2d 725 (D.C.Cir. 1957), *cert. denied*, 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067 (1958), *cert. denied*, 362 U.S. 943, 80 S.Ct. 809, 4 L.Ed.2d 771 (1960), *cert. denied*, 368 U.S. 992, 82 S.Ct. 610, 7 L.Ed.2d 529 (1962). Clearly, our *Roberts* decision did not adopt a rule of law dictated by the United States Supreme Court, the United States constitution, or the Florida constitution, nor did it apply retroactively to any pending decisions except those in which that issue had been preserved and which were actually pending on appeal. Petitioner's counsel in oral argument recognized the well established rule of law that there is no requirement that counsel, to be reasonably effective, must anticipate changes in the law. *See Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). There clearly was no substantial deficiency by appellate counsel and no prejudice stemming from the failure to raise this issue.

[9] The third asserted omission by appellate counsel concerns his failure to raise as error the exclusion of testimony by witness Pat Duval. The testimony of this witness was proffered at trial to show the jury that, given the family history of abuse and incest by the father of the petitioner, the feelings professed by the petitioner to the expert witnesses about his father were in fact "inappropriate." The proposed witness Duval was not an expert witness and our review of the record reveals that the ruling of the trial judge was clearly within his discretion and was proper under the circumstances of this case. The failure to raise this issue on appeal was not a substantial deficiency by appellate counsel, and there was no prejudice.

[10] The fourth asserted omission of appellate counsel concerns his failure to argue an improper doubling of the aggravating circumstances and of failure to properly present mitigating circumstances for re-evaluation by this Court. The record does reflect that the trial judge doubled up certain listed aggravating circumstances but that in and of itself is not error. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978); *Washington v. State*, 362 So.2d 658 (Fla. 1978); *Elledge v. State*, 346 So.2d 998 (Fla. 1977). What is important is that the aggravating circumstances considered by the trial judge were in fact statutory aggravating circumstances. The full sentencing order is set forth in the original opinion and reflects full and considered judgment by the trial judge and this Court of all the aggravating and mitigating circumstances. The trial judge specifically addressed and evaluated the mental condition of the petitioner as it should be applied under section 921.-141(6Xb), (f), Florida Statutes (1973). He had heard the testimony of five experts concerning the mental condition of the petitioner and determined that it should not be considered a mitigating factor.

Our decision in *Provence v. State*, 337 So.2d 783 (Fla.1976), upon which the petitioner principally relies, does not control because there were no mitigating circumstances. *See Elledge v. State*. *Provence* was decided in July of 1976, seven months after the initial brief was filed on the appeal and three months after oral argument. Under the circumstances, we find there was no substantial deficiency in appellate counsel for failure to present this issue to the Court and no demonstrated prejudice to the petitioner.

We have carefully reviewed the petition, the record in this cause, and the record in the original cause concerning the asserted issues to make our findings in this proceeding. We are very mindful that this is a death case, that an execution warrant has been signed, and that our findings from these records must now be presumed correct by any federal court that reviews these proceedings, absent certain factors enumerated in 28 U.S.C. § 2254(d) (1976). *See Sumner v. Mata*, — U.S. —, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

We conclude the record is clear that there was no substantial deficiency in the petitioner's representation on appeal by which the petitioner was prejudiced. The petition for habeas corpus is denied, as is the stay of execution of sentence.

No petition for rehearing will be entertained.

It is so ordered.

ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

SUNDBERG, C. J., concurs in result only.

ENGLAND, J., did not participate in the consideration of this case.

Manuel VALLE, Appellant,

v.

STATE of Florida, Appellee.

No. 54572.

Supreme Court of Florida.

Feb. 26, 1981.

Defendant was convicted in the Circuit Court, Dade County, Ellen J. Morphonios, J., of first-degree murder of a police officer, attempted murder in the first degree, and possession of a firearm by a convicted felon. Defendant appealed. The Supreme Court held that: (1) where, with expedited trial date and resulting abbreviated trial preparation, defense counsel, even though diligent, was unable to interview 24 of 59 witnesses listed by State pursuant to discovery rules, was denied opportunity to investigate defendant's mental condition and was denied opportunity to present evidence concerning pretrial motions, prejudice to defendant was clear from record; (2) asserted overwhelming evidence against defendant in trial phase did not override his Sixth and Fourteenth Amendment rights to adequate preparation time and effective assistance of counsel; and (3) trial which commenced only 36 days after police officer's murder, 34 days after defendant's arrest, 24 days from date of arraignment and 21 days from date of first discovery information furnished by State denied defendant fair trial, under circumstances of case.

Judgment and sentence vacated, and case remanded for new trial.

Adkins, J., dissented.

1. Criminal Law ⇐1166.11

Where, with expedited trial date and resulting abbreviated trial preparation, defense counsel, even though diligent, was unable to interview 24 of 59 witnesses listed by State pursuant to discovery rules, was denied opportunity to investigate defendant's mental condition and was denied opportunity to present evidence concerning pretrial motions in prosecution for, inter alia, first-degree murder of police officer, prejudice to defendant was clear from record. 33 West's F.S.A. Rules of Criminal Procedure, Rules 3.210, 3.220(a)(1)(i); U.S.C.A.Const. Amends. 6, 14.

2. Criminal Law ⇐577.1

Trial court should have allowed defense counsel time to interview additional witnesses and to present evidence on his pretrial motions, and should also have allowed opportunity for mental examination of defendant, given evidence of defendant's industrial accident and consequent intracranial surgery. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.210.

3. Criminal Law ⇐577.1, 641.1

Asserted overwhelming evidence against defendant in trial phase did not override his Sixth and Fourteenth Amendment rights to adequate preparation time and effective assistance of counsel. 33 West's F.S.A. Rules of Criminal Procedure, Rules 3.210, 3.220(a)(1)(i); U.S.C.A.Const. Amends. 6, 14.

4. Criminal Law ⇐1177

Prejudice to defendant from want of time for preparation was clear from record as to sentencing phase of prosecution, there being no time to adequately locate mitigation witnesses or investigate mitigating circumstances, to inquire into defendant's

the Legislature evidently found to be a series of abuses in the area of debtor-creditor relations. The legislation provided neither criminal penalties nor administrative enforcement. The minimum damage award and the civil suits it encourages constitute the only means by which the legislative purpose may be vindicated. We decline to strip the CCPA of the only self-enforcing mechanism it possesses.

The judgment of the circuit court is affirmed in part and reversed in part, and the cause is remanded for further proceedings not inconsistent herewith.

OVERTON, C. J., and ROBERTS, ADKINS, BOYD, ENGLAND and HATCHETT, JJ., concur.

Thomas KNIGHT, Appellant,

v.

STATE of Florida, Appellee.

No. 47599.

Supreme Court of Florida.

Sept. 30, 1976.

Defendant was convicted in Circuit Court, Dade County, Gene Williams, J., of first-degree murder and sentenced to death, and he appealed. The Supreme Court held, inter alia, that certain testimony was properly admitted as part of the res gestae of the crime charged; that the trial court did not err in allowing the State to prosecute the charges under a theory of felony-murder when the indictment charged premeditated murder; and that imposition of the death penalty was warranted.

Affirmed.

1. Jury ⇐97(1)

Trial court in murder prosecution did not err in denying defendant's challenge for cause as to partiality of juror.

2. Jury ⇐136(4)

Trial court in murder prosecution did not err in denying defendant's motion for additional peremptory challenges on grounds of pervasive pretrial publicity.

3. Criminal Law ⇐124

Trial court in murder prosecution did not err in denying defendant's motion for change of venue.

4. Criminal Law ⇐366(1)

Where defendant was charged with murder in first degree, and could be tried and convicted under indictment if killing was committed by him in perpetration of any robbery or kidnapping, trial court acted properly in admitting, as res gestae, testimony by bank president that deceased victim had told him that he was being kidnapped and that his wife was being held for $50,000 ransom.

5. Indictment and Information ⇐191(4)

Trial court properly permitted State to prosecute charges under theory of felony-murder when indictment charged premeditated murder.

6. Homicide ⇐354

Imposition of death penalty was warranted in prosecution in which defendant was shown to have murdered two victims in course of kidnapping and robbery.

William Hutchinson, Jr., Miami, for appellant.

Robert L. Shevin, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., for appellee.

PER CURIAM.

This cause is before us on direct appeal to review the convictions of Thomas Knight on two counts of murder in the first degree and sentence to death. We have jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

Appellant was indicted for the first degree murder of Lillian and Sydney Gans in that he did kill and murder them from premeditated design by shooting them with a rifle. Briefly the facts leading up to the murder and defendant's apprehension by the authorities are as follows. Upon arriving at his place of business and parking in his designated space, Mr. Gans was approached by the defendant who was carrying an automatic rifle and was told to reenter his automobile, to drive home and get Mrs. Gans, and to drive to the bank and get $50,000. While inside the bank, Mr. Gans informed the president about the abduction. The police and FBI were alerted. Mr. Gans then returned to his car with the money. He and his wife, shortly thereafter, were found shot to death, the fatal shots—perforating through their necks—having been fired from the rear seat of the vehicle. Thereafter, appellant was apprehended and taken into custody in a weeded area about 2,000 feet from the Gans' vehicle. Underneath him buried in the dirt was an automatic rifle and a paper bag containing $50,000. There were blood stains on his pants.

After an extensive trial, the jury returned verdicts of guilty of both counts of murder in the first degree and, after separate hearing on sentencing, recommended the death penalty be imposed. The trial judge agreed that under the circumstances the death penalty was the appropriate sentence and wrote his order on sentence carefully evaluating the mitigating and aggravating circumstances, stating in part:

"1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141(5), are as follows:

"(d) That the capital felonies were committed while the defendant was engaged in the commission of or in flight after committing the crime of kidnapping of Lillian Gans, and/or the robbery of Sidney Gans.

"(e) That the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest.

"(f) That the capital felonies were committed for pecuniary gain.

"(h) That the capital felonies were especially heinous, atrocious or cruel.

* * * * * *

"It might be considered a close question as to whether these murders were especially heinous, atrocious or cruel, because of the fact that when the defendant actually killed the victims, death was almost instantaneous. However, the Court is of the opinion that the hours preceding the actual killings constituted exceedingly cruel treatment of the victims. Mr. Gans was continually under severe strain, not only thinking of his own life but that of his wife. Mrs. Gans was also under continuous strain. Mr. and Mrs. Gans proceeded to follow the directions of the defendant hoping to escape death, although probably fearing for their lives at every instant. When it became apparent to them that the defendant was forcing them to a deserted area, it probably also became apparent to them they were going to be murdered. This feeling no doubt continued up to the actual moment of the deaths. Mr. Gans' actions were particularly noteworthy. After the initial danger, he could have escaped when directed by defendant to the bank. However, Mr. Gans, with commendable courage, attempting to save the life of his wife, again voluntarily submitted himself to the control of the defendant, only to lose his life together with his wife. All of these circumstances constitute particularly cruel, heinous and atrocious actions by the defendant when he finally shot the victims.

"3. That as to mitigating circumstances, the Court finds as follows:

"(a) the defendant has a history of prior criminal activity.

"(b) the defendant was not under the influence of extreme mental or emotional disturbance when the capital felonies were committed.

"(c) the victims were not participants in the defendant's conduct nor did they consent to his acts.

"(d) the defendant was not an accomplice in the capital felonies committed by another person and his participation was not relatively minor.

"(e) the defendant did not act under extreme duress or under the substantial domination of another person.

"(f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

"(g) the age of the defendant at the time of the crime was 23 years. The Court finds age not to be a mitigating circumstance. The Court finds that the defendant is of at least average intelligence and experience as an adult.

* * * * * *

" The Court finds, as did the jury, that the defendant is legally sane, knows right from wrong, knows the nature and consequences of his actions and did at the time of the commission of the two murders."

Twenty three points have been stated as points on appeal by appellant although not all of these points are argued. Careful review of the briefs and voluminous transcript of record reveal that none of these contentions constitutes reversible error.

[1] Appellant urges error in the trial court's denial of his challenge for cause as to the impartiality of a juror. Preliminarily, it must be noted that the record does not reveal any challenge for cause of Juror Hochstadt. The record examination of Juror Hochstadt does not indicate any showing of partiality toward the State. In fact, the record evidences that the subject juror had formed no opinion as to the guilt or innocence of the defendant and would be completely impartial.

[2] The trial court did not err in denying appellant's motion for additional peremptory challenges because of pervasive pre-trial publicity. He expressly determined that no showing of prejudice had been made. Additionally we note that the record clearly shows that the trial judge was extremely liberal in excusing jurors for cause in order that an impartial trial would be secured.

[3] Appellant's argument that the court erred in denying his motion for change of venue is without merit. He has failed to prove that he did not receive a fair and impartial trial and that the setting of his trial was inherently prejudicial. Recently, in *Doblert v. State*, 328 So.2d 433 (Fla. 1976), this Court restated the requirements set out by the Supreme Court of the United States in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), relative to a fair and impartial trial, as follows:

"The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent" jurors.' *Irvin v. Dowd*, supra, 366 U.S. [717], at 722, 81 S.Ct. [1639], at 1642, [6 L.Ed.2d 751]. Qualified jurors need not, however, be totally ignorant of the facts and issues involved.

"'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' *Id.*, at 723, 81 S.Ct. [1639] at 1642.

"At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' *Ibid.*

"The *voir dire* in this case indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. Some of the jurors had a vague recollection of the robbery with which petitioner was charged and each had some knowledge of petitioner's past crimes, but none betrayed any belief in the relevance of petitioner's past to the present case. Indeed, four of the six jurors volunteered

their views of its irrelevance, and one suggested that people who have been in trouble before are too often singled out for suspicion of each new crime—a predisposition that could only operate in petitioner's favor."

[4] Appellant submits that the introduction of the testimony of Mr. Gill, the bank president, to the effect that Mr. Gans, the deceased victim had told him that he had been kidnapped and his wife was being held for $50,000 ransom and describing what had occurred thus far, into evidence was error as it was not within the res gestae of the crime charged. The testimony given by Mr. Gill was admissible as being within the res gestae of the crime of kidnapping, one of the felonies enumerated in the felony murder statute, section 782.04(1)(a), Florida Statutes. The crime for which appellant was charged was murder in the first degree, and he could be tried and convicted under the indictment if the killing was committed by him in the perpetration of any robbery or kidnapping. The trial court properly held this evidence admissible as res gestae, an exception to the hearsay rule. Cf. *State v. Williams*, 198 So.2d 21 (Fla. 1967), *Campbell v. State*, 227 So.2d 873 (Fla. 1969).

[5] We find appellant's allegation that the court erred in allowing the State to prosecute the charges under a theory of felony murder when the indictment charged premeditated murder to be absolutely contrary to established precedent. In *Larry v. State*, 104 So.2d 352 (Fla.1958), this Court explained:

"Furthermore, we think there was ample evidence to sustain a verdict for murder in the first degree committed in the perpetration of a robbery. The trial judge instructed the jury on this phase of the law. His instruction was warranted by the evidence and in such a case premeditation is presumed as a matter of law. *Leiby v. State*, Fla., 50 So.2d 532. *Proof of a homicide committed in the perpetration of the felonies set forth in § 782.04, Florida Statutes, F.S.A., may be shown under an indictment charging the unlawful killing of a human being from a premeditated design. Killen v. State*, Fla., 92 So.2d 825; *Everett v. State*, Fla., 97 So.2d 241." (emphasis supplied)

Subsequently in *Barton v. State*, 193 So.2d 618 (Fla.App.2d 1967), authored by Justice Adkins while temporarily assigned to the District Court as an Associate Judge, that court opined and we agree:

"The indictment was in the usual form charging murder to have been committed with a premeditated design to effect the death of Corbin. The appellant argues that he should have been furnished with a bill of particulars specifying whether the State would proceed on the theory of felony murder or premeditated murder. Without being apprised of the specific theory under which the State was electing to proceed, appellant says he was placed at a burdensome disadvantage by being forced to prepare defenses to each, which defenses necessarily are inconsistent. Appellant contends that forcing such a burden upon him constituted a denial of due process.

"The allegations of the indictment were sufficient to charge murder in the first degree, regardless of whether the murder was committed in the perpetration of any of the felonies mentioned in F.S.A. § 782.04 or was committed with a premeditated design. *Southworth v. State*, 98 Fla. 1184, 125 So. 345. Under such a charge evidence under either theory may be introduced and defendant may be convicted either on the theory that the killing was carried out as a result of a premeditated design to effect death or on the theory of felony murder. *Larry v. State*, 104 So.2d 352 (Fla.1958)."

Cf. *Haggett v. State*, 255 So.2d 268 (Fla.App.3, 1971).

Having carefully evaluated all other points raised on appeal by appellant, we find none of them meritorious as to constitute reversible error.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed and we have also, pursuant to

Rule 6.16(b), Florida Appellate Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and the evidence in the record, sub judice, does not reveal that the ends of justice require that a new trial be awarded.

[6] Furthermore, we find appellant's position that the death penalty is not warranted under the particular facts of this case to be untenable. The atrocious, cruel, and heinous nature of the crimes committed by the appellant was carefully explained by the trial judge in his written findings of fact relative to the sentencing portion of this cause. Review of the record and consideration of the enumerated aggravating and mitigating circumstances support the conclusion that the death sentence recommended by the jury and imposed by the judge is appropriate under the particular facts of this cause.

Accordingly, no reversible error appearing, the judgments and sentence of the Circuit Court here under review are affirmed.

It is so ordered.

OVERTON, C. J., and ROBERTS, ADKINS, BOYD, SUNDBERG and HATCHETT, JJ., concur.

ENGLAND, J., took no part in the consideration of this case.

In the Matter of THE FLORIDA BAR, Petitioner.

No. 49495.

Supreme Court of Florida.

Sept. 30, 1976.

The Florida Bar petitioned for amendment of the Integration Rule to provide for a single formal evidentiary hearing in grievance proceedings. The Supreme Court held that the proposed changes, whereby committees would no longer hear evidence but rather would vote probable cause, no probable cause, or recommend a private reprimand for minor misconduct on the basis of a presentation to the committee by the investigating member of bar counsel and by which the accused would be permitted to make a statement to the committee but would not have the right of confrontation, the right to cross-examination, the right to be present during hearing of evidence, or the right to present evidence, would not be approved.

Petition denied.

England, J., concurred in result only.

Attorney and Client ⇐54

Proposed changes to Integration Rule of Florida Bar, whereby grievance committees would no longer hear evidence, but rather would vote probable cause, no probable cause, or recommend private reprimand for minor misconduct on basis of presentation to committee by investigating member of bar counsel and by which accused would be permitted to make statement to committee, but would not have right of confrontation, right to cross-examination, right to be present during hearing of evidence, or right to present evidence, would not be approved by Supreme Court. 32 West's F.S.A. Integration Rule of The Florida Bar, art. 11, rule 11.04.

Edward J. Atkins, President-Elect, Miami, William A. Foster, Chairman, Disciplinary Procedure Committee, West Palm Beach, and Norman A. Faulkner, Staff Counsel, Tallahassee, for The Florida Bar, petitioner.

PER CURIAM.

By Petition for Amendment of the Integration Rule, The Florida Bar recommends

Supreme Court of the United States

No. A-860

ASKARI ABDULLAH MUHAMMAD,

Petitioner,

v.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 31, 1983.

/s/ Lewis F. Powell

Associate Justice of the Supreme Court of the United States

Dated this 23rd

day of April, 1983

§775.082 Florida Statutes (1973), Penalties for felonies and misdemeanors.-

(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in §921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

* * *

§782.04 Florida Statutes (1973), Murder.-

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempts to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

(b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

* * *

§921.141 Florida Statutes (1973), Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.-

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.-Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trail [sic] jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall inlcude matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) [sic. Should read (5) and (6).] of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.-After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6)[sic];

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7)[sic], which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.-Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in wwriting its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6)[sic], and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7)[sic], to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7)[sic] and upon the records of the trial and the sentencing proceedings. If the court does not make the findings regarding the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.-The judgment of conviction and sentence

of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.-Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to that person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the comission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.-Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme dure[illegible] or under the substantial domination of anothe[illegible] person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.